

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

NARTRON CORPORATION,

Plaintiff,

CASE NO. 05-70323

HON. LAWRENCE P. ZATKOFF

v.

TUTHILL CORPORATION,

a Missouri corporation,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

This matter is before the Court on Defendant's July 27, 2006 Motion for Reconsideration. Pursuant to E.D. MICH. LR 7.1(g)(2), no response is permitted. By its Motion for Reconsideration, Defendant challenges the Court's July 26, 2006 order denying the admission of the deposition testimony of Larry Dalton.

Defendant argues that although the Court's analysis in the July 26 order was based upon Federal Rule of Evidence 804, Federal Rule of Civil Procedure 32(a)(3)(B) allows the introduction of the deposition. Rule 32(a)(3)(B) provides, in part, that a deposition may be used if "the witness is at a greater distance than 100 miles from the place of the trial or hearing."

However, the analysis does not end there. In *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404 (3d Cir. 1991), the Third Circuit upheld a district court's refusal to admit evidence under Rule 32(a)(3)(B). The Third Circuit held that: "We agree . . . that the district court was not automatically required to admit the deposition testimonies under Federal Rule of Civil Procedure 32(a)(3)(B) just because the witnesses were more than 100 miles away as plaintiffs appear to argue. The trial judge appropriately considered surprise to opposing counsel." *Id.* at 1410. In the instance

case, Plaintiff states that at all times it was lead to believe that Mr. Dalton would appear as a witness.

The Court finds that Plaintiff would be substantially prejudiced by the introduction of Mr. Dalton's deposition, in lieu of live testimony. Thus, Defendant is not entitled to admit the deposition pursuant to Rule 32(a)(3)(B).

Therefore, Defendant's Motion for Reconsideration is HEREBY DENIED.

IT IS SO ORDERED.

s/Lawrence P. Zatkoff

LAWRENCE P. ZATKOFF

UNITED STATES DISTRICT JUDGE

Dated: July 27, 2006

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Order was served upon the attorneys of record by electronic or U.S. mail on July 27, 2006.

s/Marie E. Verlinde

Case Manager

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